UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

September 1, 1998

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 98B00051
AGRIPAC, INC., Respondent.	)	

ORDER DENYING MOTIONS FOR PROTECTIVE ORDER,
TO BIFURCATE PROCEEDINGS, AND TO STAY ADVERTISING

I. PROCEDURAL HISTORY

This is an action arising under the Immigration and Nationality Act as amended, 8 U.S.C. § 1324b (INA), in which the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) alleges that respondent Agripac, Inc. engaged in a pattern and practice of discrimination in violation of the Act. OSC filed a complaint alleging that Agripac maintained an ongoing discriminatory policy which required that persons who appeared to be foreign produce certain specific documents before they would be given applications for employment and that Agripac rejected other genuine documents evidencing those individuals' identity and employment eligibility, but that persons who did not appear to be foreign were not required to produce documents before they could obtain applications for employment. OSC also made allegations that Augustin Lua Talavera was discriminatorily denied an opportunity to apply for work at Agripac on July 11, 1997, that Agripac rejected his genuine social security card and other genuine documents which he presented and requested different documents, refused to give him an application, and treated him differently from applicants who did not appear to be foreign on the basis of his perceived citizenship status. The complaint was accompanied by a charge filed on his behalf dated August 1, 1997. Agripac filed an answer denying the material allegations of the complaint and asserting four affirmative defenses; the answer was amended on July 23, 1998, to add a fifth affirmative defense.

On June 17, 1998, respondent filed a Motion for Protective Order seeking to preclude the Office of Special Counsel from publishing in any manner a proposed public announcement describing the complaint and seeking information from persons who had attempted to apply for work at Agripac. A courtesy copy of OSC's proposed notice had been sent to Agripac in advance of its distribution. While the notice itself did not specifically identify the particular organizations or

radio stations OSC proposed to use for the distribution, OSC asserted elsewhere[1] that it proposed to distribute the notice in or near Woodburn, Oregon.

OSC faxed a response to the motion on June 24, 1998, the day of the previously scheduled prehearing conference. At that conference the motion for protective order was taken under advisement and Agripac was given seven days in which to set forth with specificity any language in complainant's proposed notice which it believed to be untruthful, deceptive, or likely to mislead or confuse, and the reasons therefor. The parties were also encouraged to work together to see if mutually acceptable language for a notice could be agreed upon, and to report not later than July 30, 1998 whether agreement had been achieved. On July 2, 1998, Agripac filed a response to complainant's reply, after which OSC filed an additional reply brief on July 22, 1998.

On July 31, 1998, Agripac filed a motion to bifurcate proceedings and to stay advertising, to which OSC responded on August 10, 1998. It was reported that the parties had conferred but were unable to resolve their differences over the issue of advertising.

A follow-up telephonic case management conference was convened on August 27, 1998 at which some of the specific questions raised by the proposed notice were discussed and argument was heard. The motions for a protective order, to bifurcate proceedings, and stay advertising are ripe for ruling.

II. THE MOTION FOR PROTECTIVE ORDER

A. The Proposed Notice

Correspondence transmitting the proposed notice to Agripac indicated that OSC proposed to distribute a radio notice through public service announcements and a written notice through postings with community organizations. The radio message which OSC proposed was as follows:

> The following is an important message concerning the U.S. Government and Agripac, Inc. The U.S. Department of Justice is involved in legal action against Agripac, alleging that Agripac's hiring procedures are discriminatory, and that people may have been unfairly denied employment. If you sought work at Agripac, the Department of Justice needs to talk to you about your experience. Please call Ms. _____ _____, U.S. Department of Justice, (toll free) at 1-800-___ - ____ (from 6:15 am to 2:15 pm, PST) Monday through Friday. You may

[1] OSC's response to Agripac's second pleading denominated as "Complainant's Response to Respondent's July 1, 1998 Protective Order Pleading," and filed July 22, 1998, at footnote 6.

call in any language. If the case is decided by a court against Agripac, it is possible that you may receive money. Please note that the Department of Justice's complaint is only an allegation and no finding has been made by any judge as to whether Agripac has illegally discriminated.

OSC's proposed written notice is captioned "Notice to Potential Victims of Alleged Discrimination by Agripac, Inc.," and reads as follows:

> The U.S. Department of Justice is involved in a legal action against Agripac, Inc., alleging (1) that Agripac may unlawfully require work documents like "la mica" or a social security card from certain workers before handing out applications, and (2) that Agripac may have unfairly refused to hire people because it believed that their valid work documents were false. If you sought work at Agripac, whether you got a job there or not, the Department of Justice needs to talk to you about your experience.
>
> No decision has been made by any judge whether Agripac acted unlawfully or not; at this time, the Department of Justice's complaint is only an allegation. If the case is decided by a judge against Agripac, it is possible that some people may be entitled to money. This would be in the form of back wages if an applicant was denied a job unfairly, and the denial resulted in a loss of income.
>
> Specifically, it is important that the Department of Justice talk to you if you or someone you know:
>
> **!** Sought work at Agripac, whether you got a job there or not,
>
> **!** Was required to produce an ID or work papers (like "the mica" or a social security card) before Agripac gave you a job application,
>
> **!** Was denied a job because Agripac was afraid that your valid ID or work papers were fake, or
>
> **!** Was not hired by Agripac because you looked or sounded "foreign."
>
> If you know anything about these issues, please call Ms. _____ _____, U.S. Department of Justice, (toll free) at 1-800-___-____ (from 6:15 am to 2:15 pm PST) Monday through Friday. You may also write Ms. _____ at:
>
> _____ _____/Agripac Case
> Civil Rights Division
> U.S. Department of Justice

P.O. Box 27728
Washington, D.C. 20038-7728

You may call or write in any language.

At the conference on August 27, 1998, OSC indicated that its intent was to promulgate the notices in the vicinity of Woodburn, Oregon, for a period of one month.

B. The Views of the Parties

Agripac's motion asserted, citing to United States v. North Carolina, 914 F. Supp. 1257 (E.D.N.C. 1996), that OSC's proposed notice constitutes wrongful solicitation. In addition, Agripac questioned whether OSC actually had reasonable cause to file a pattern and practice action, and claimed that the notice requires speculation on the part of applicants as to Agripac's mental state, arguably bribes prospective witnesses with the prospect of monetary recovery, goes beyond the scope of the complaint, and constitutes a "witch hunt."

OSC's response relied on case law supporting the broad right of a plaintiff's attorneys to find and communicate with persons who may have been affected by a defendant's allegedly discriminatory practices, and the heavy burden of justification which must be shown for any prior restraints on such communication. Agripac's reply asserted that OSC had failed to show that it had a right to advertise, was attempting to extend the permitted period for its administrative investigation which is limited by 8 U.S.C. § 1324b(d)(1) to 120 days, and should be required to prove liability before it is permitted to search for victims. Agripac also stated that OSC should be limited to "conventional" discovery techniques, and that the proposed advertising has the potential of negatively affecting its reputation in the community, its relationship with its current employees, and its good will. Agripac further objected to OSC's conducting private interviews with any individuals who respond to the notice, and to the lack of restriction of the time period and locations covered.

OSC's supplemental response rejected the proposition that its finding of reasonable cause is susceptible to collateral attack and asserted further that public notice is the only way it has to identify the affected persons because Agripac did not keep any record of the identity of the persons to whom it denied the opportunity to apply by refusing to give them the application forms.

C. The Applicable Standards

OCAHO rules[2] governing protective orders provide that upon motion either by a party or by the person from whom discovery is sought, and for good cause shown, an Administrative Law Judge

[2] Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. Pt. 68 (1997).

may make any order which justice requires to protect a party or person from annoyance, harassment, embarrassment, oppression, or undue burden or expense. The rule is specifically directed to discovery issues, and authorizes such remedial measures as an order that 1) the discovery not be had; 2) the discovery may be had only on specified terms and conditions, including a designation of the time, amount, duration, or place; 3) the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; or 4) certain matters not relevant may not be inquired into, or the scope of discovery be limited to certain matters. 28 C.F.R. § 68.18(c). The precise applicability of the rule to an opposing party's communication with nonparties is unclear; the rule is customarily invoked when a party seeks relief from specific formal discovery requests addressed to itself.

With respect to any blanket prior restraints on a party's communication with nonparties, the burden is always on the moving party to show good cause why any such order should issue. As noted in Gulf Oil Co. v. Bernard, 452 U.S. 89, 98 (1981), there must first be a particularized showing of need to justify any prior restraints on expression, and any order restricting communication must be based on a clear record and specific findings that reflect a weighing of the need for limitation and potential interference with the rights of the parties. With respect to attorney communications to persons potentially affected by particular litigation, a clear distinction has consistently been made between an attorney's solicitation of business for his or her own pecuniary benefit and a nonprofit or public interest organization's solicitation of clients to advance political objectives or public policy goals such as nondiscrimination, which is afforded broader protection. In re Primus, 436 U.S. 412, 426-31 (1978), NAACP v. Button, 371 U.S. 415 (1963). The Ninth Circuit has similarly held in an action seeking to vindicate employee rights that restrictions on communications are justified only in exceedingly narrow circumstances. Domingo v. New England Fish Co., 727 F.2d 1429, 1439-41(1983), modified, 742 F.2d 520 (9th Cir. 1984). Even in a commercial context, an attorney's truthful and nondeceptive communications through advertising to persons potentially affected by particular litigation can be restricted only in the service of a substantial government interest, Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 638 (1985); any blanket ban on such communication accordingly bears a heavy burden of justification.

D. Discussion

Agripac's initial pleading purported to move for a protective order "pursuant to FRCP 26C" (sic), a rule not applicable to this proceeding.[3] Agripac did not refer to the OCAHO rule governing protective orders, nor did it claim that it was in need of protection from annoyance,

[3] If Rule 26(c) of the Federal Rules of Civil Procedure were applicable, the motion would not have been accepted for filing because it was not accompanied by a certification that the movant in good faith conferred or attempted to confer with OSC in an effort to resolve the dispute without court action, as is required by that rule. It appears undisputed that no attempt was made beforehand by Agripac to confer with opposing counsel prior to filing the motion.

harassment, embarrassment, oppression, or undue burden or expense, the factors enumerated in the rule. Its submissions in fact comply neither with the federal rule nor the OCAHO rule governing protective orders.[4]

Agripac's motion will be denied on substantive grounds, in light of the rigorous standards which must be met before such an order may issue. First, the short answer to Agripac's concerns about solicitation and the disciplinary rules may be found in Primus and its progeny: as a governmental agency charged by law with the implementation of public policy as defined by the United States Congress, OSC is obviously not on the same footing as an attorney soliciting clients for commercial purposes. There is no suggestion that OSC will be seeking attorney's fees or that it has any pecuniary interest in this litigation.[5]

While the Executive Branch as such has no First Amendment rights, EEOC v. Mitsubishi Motor Mfg. of Am., Inc., 102 F.3d 869, 871 (7th Cir. 1996), the broad rule set down in Gulf Oil was not based on the First Amendment but on the policies embodied in the federal rules. EEOC v. Mitsubishi Motor Mfg. of Am., Inc. 960 F.Supp 164, 167 n.2 (C.D. Ill. 1997). Agripac's submission failed to pinpoint any facts or make any record that would permit the specific findings required by Gulf Oil. Its allegations of prejudice consisted, rather, of an unsworn, generalized statement that "this type of advertising has the potential of negatively effecting (sic) Agripac's reputation in the community, its relationship with its current employees and its good will without any proof that it has indeed discriminated . . . [and] has the potential for unwarranted problems for Agripac." Specifically what those unwarranted problems are, however, was not disclosed. The only affidavit filed in this matter is that of one of the attorneys for Agripac in support of its motion to bifurcate and to stay advertising. With respect to prejudice, the affidavit asserted only that the affiant's office had conducted legal research, that the affiant was unaware of any authority for the government to engage in advertising, and that he was filing the motion "[d]ue to the lack of legal support for the government's position, combined with the prejudicial effect the advertising may have on my client." Again, the "prejudicial effect" is not further elaborated.

Agripac's second pleading interjected the additional assertion that OSC "has not proved that it cannot obtain the information it seeks to prove its alleged pattern and practice claim against Agripac through the traditional discovery channels. As such the advertisement prejudices Agripac." What causal connection Agripac seeks to establish between the first and the second

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[4] In addition, Agripac failed to serve a copy of its motion on Augustin Lua Talavera, who is also a party to this proceeding, 28 C.F.R. § 68.2(o), as is required by 28 C.F.R. § 68.6(a).

[5] The role of the OSC here is more analogous to that of a public interest organization than to that of a private attorney in business for profit. Cf. Minnesota v. United States Steel Corp., 44 F.R.D. 559, 577 (D. Minn. 1968)(state acting in parens patriae and not seeking fees), Illinois v. Harper & Row Publishers, Inc. 301 F. Supp. 484, 486 (D. Ill. 1969).

statement is not self evident, and no authority is cited for the suggestion that OSC bears any burden of proof at this stage. Agripac does not contend that it has available or can produce in discovery any record of the identity of the persons who tried to obtain applications for seasonal jobs and whose names Agripac never recorded, and it seems reasonably clear that conventional discovery is unlikely to disclose the identity of people to whom Agripac refused to give employment applications.

Agripac's insistence that OSC is obliged to present authority which entitles it to advertise misperceives the allocation of the burden of proof in this proceeding. The burden of proof is not on OSC but on Agripac to justify the limitations it seeks on OSC's communications. This it has failed to do because there has been no showing of precisely how the publication of the allegations of OSC's complaint, which are already a matter of public record, will harm Agripac. Beyond the bare assertion, there is no showing of any impact on reputational interests or employee relations. The people most likely to respond to the notice are not current employees, but those whom Agripac refused to consider for employment. Thus the usual concerns of a defendant seeking to restrict opposing counsel's ex parte communications with its current workforce about conditions in the workplace, see, e.g., Hoffman v. United Telecomm., Inc., 111 F.R.D. 332, 336 (D. Kan. 1986), are not implicated here.

The idea that OSC is somehow impermissibly seeking to extend the statutory period described in 8 U.S.C. § 1324b(d)(1) for investigation of a charge is simply baffling in light of the fact that the same statutory provision also gives OSC authority for own-initiative investigation not subject to that same time limitation: if OSC really wanted additional time to conduct an administrative investigation of Agripac, it had ready means at hand to conduct an independent investigation on its own initiative. Agripac's reasoning here would suffice to deny discovery to OSC in any case at all on the grounds that it ought to have obtained all of its evidence during the administrative investigation; this is simply not the law. A complainant is not obliged to prove all the elements of his or her case before being allowed to engage in discovery. Neither do I have any authority, necessity, or reason to go beyond OSC's reasonable cause determination and make inquiry as to its evidentiary basis.[6] Cf. United States v. Balistrieri, 981 F.2d 916 (7th Cir. 1992), cert. denied, 510 U.S. 812 (1993).

Finally Agripac asserted that irreparable harm will be caused if OSC were to interview potential witnesses because OSC might put words in their mouths, because responses "outside of the

[6] North Carolina, relied on by Agripac, posed an entirely different question: whether there was an actual case or controversy sufficient under Article III to invoke the jurisdiction of the district court in a disparate impact case. North Carolina held that where there was no identification either of any victim or of any specific pattern or practice, a mere statistical disparity in the work force could not itself give rise to such a case or controversy and the court was consequently without jurisdiction. 914 F. Supp. at 1268-1270. No such concern is present here and this is not a statistical "disparate impact" case.

relevant time period will undoubtedly be generated," and because the notice is not sufficiently limited. Agripac sought to limit the time period for inquiry to a period from September 30, 1996, the effective date of the most recent amendment to 8 U.S.C. § 1324b(a)(6), through July 11, 1997, the alleged date of discrimination against Talavera. Agripac also proposed the alternatives of monitoring any OSC interviews with persons who respond to the OSC's notice, or of propounding a written questionnaire with agreed upon questions to persons who sought to apply during the period between September 30, 1996 and July 11, 1997. At the case management conference on August 27, 1998, Agripac sought nunc pro tunc to amend the time period it requested to a period consisting of the 180 day period prior to the filing of the Talavera charge.[7] No objection was made and the amendment is accepted.

Agripac's request to limit the proposed inquiry to the 180-day period prior to the filing of the charge confuses issues of discovery or evidence gathering with issues of recovery. It may be that any ultimate recovery will be limited to those persons who attempted to apply for work in the period specified; this is not a reason to limit the gathering of evidence to that period. Employment practices outside the limitations period are always potentially relevant to the extent they may demonstrate evidence of an ongoing policy or practice. It is also possible, of course, that OSC may be able to establish a continuing violation through proof of implementation of an ongoing discriminatory policy. See, e.g., United States v. Robison Fruit Ranch, 6 OCAHO 855, at 335-36 (1996),[8] rev'd on other grounds, 147 F.3d 798 (9th Cir. 1998), and Havens Realty Corp. v. Coleman, 455 U.S. 363, 380 (1982).

My observation of the progress of this case gives me no reason to believe that the parties have any prospect whatever of reaching agreement on the appropriate questions to be asked in a joint questionnaire. If Agripac wishes to advertise and to promulgate its own questionnaire addressed to persons who sought to apply during the 180-day period, it is of course free to do so, but it should afford OSC the same prior notice and opportunity to seek review as it received. It will not be permitted to monitor or participate in OSC's interviews with potential witnesses. There

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[7] Agripac calculated this period as beginning on February 7, 1997, evidently assuming the charge to have been filed upon its receipt by OSC on August 6, 1997. However applicable rules provide that when a charge is mailed to OSC, as this one was, it is deemed filed on the date it is postmarked. 28 C.F.R. § 44.300(b). Here that date is August 1, 1997.

[8] Citations to OCAHO precedents reprinted in the bound Volumes 1 and 2, Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Practices Laws of the United States, and Volumes 3 through 6, Administrative Decisions Under Employer Sanctions, Unfair Immigration-Related Employment Practices and Civil Penalty Document Fraud Laws of the United States, reflect consecutive pagination within those bound volumes; pinpoint citations to Volumes 1-6 are to the specific pages, seriatim, of the entire volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 6, however, are to pages within the original issuances.

has been no showing beyond the mere allegation that OSC will engage in any impropriety when interviewing persons who respond to the notice, or that interviews will be per se prejudicial.

I also find Agripac's generalized claims that proposed notice is misleading to be without support in the record. Any concerns regarding the temporal and geographical scope of OSC's proposed advertising should be satisfied by the fact that its initial distribution will be limited to the area in and around Woodburn, Oregon, and the period of one month.

The motion for a protective order will therefore be denied.

III. THE MOTION TO BIFURCATE PROCEEDINGS AND TO STAY ADVERTISING

A. The Views of the Parties

The motion to bifurcate proceedings and to stay advertising relies upon the same or similar grounds as those alleged in support of the protective order. Agripac's submission argued that bifurcation would "prevent the government from contravening its statutory obligation to complete its reasonable cause investigation prior to filing a complaint," and that OSC's discovery must be limited to the methods set out in 28 C.F.R. § 68.18. Further, it alleged that OSC has provided no authority to support the proposed advertising and no proof that it has conducted such advertising in the past. OSC opposed bifurcation as not justified and reiterated that the proposed public notice is appropriate under the circumstances here.

B. Applicable Standards

OCAHO rules do not specifically address the issue of bifurcation of proceedings. As provided in 28 C.F.R. § 68.1[9] it is therefore appropriate to look to the case law developed in the district courts under Rule 42(b) of the Federal Rules of Civil Procedure as a general guideline in ruling on a motion to bifurcate. Hernandez v. Farley Candy Co., 5 OCAHO 781, at 465 (1995). That rule provides that separate trials may be ordered in furtherance of convenience, to avoid prejudice, or when separate trials will be conducive to expedition or economy. The party seeking separate trials has the burden of proving that separation is necessary. 9 Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure § 2388 at 83 (1998 Supp.). As the Advisory Committee Notes to Rule 42(b) suggest, separation of issues for trial is not routinely ordered.

[9] The rule in pertinent part states, "The Rules of Civil Procedure for the District Courts of the United States may be used as a general guideline in any situation not provided for or controlled by these rules, the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation."

C. Discussion

Agripac did not specifically refer to Rule 42(b), or allege that bifurcation would be conducive to expedition or economy. It did allege that requiring OSC to establish liability first will "clarify what type of advertising needs to be conducted" by developing a clear profile of the "victim" and a defined time frame in which the alleged discrimination occurred, as well as by ensuring that Agripac is not prejudiced by OSC's proposed advertisement. How a profile of the "victim" will be developed in the absence of any means of identifying the affected individuals is not explained. Neither is the nature of the prejudice contemplated.

The motion to bifurcate will be denied without prejudice to its renewal, if appropriate, at the time the proposed prehearing order is submitted. To decide the bifurcation issue in advance of the completion of discovery would be premature. Whether convenience, expedition, or economy would best be served by a single hearing or by separate hearings on the issues of liability and relief cannot be determined intelligently without further development of the factual record and clarification of the scope of the proceedings. At this stage it appears more likely than not that there would be substantial overlap between the facts necessary to establish liability and damages and that the same witnesses would simply have to be called twice in a bifurcated proceeding. If so, this would lead to duplicative testimony and delay rather than convenience, expedition, and economy.

Agripac has made no showing that it will suffer any specific particularized actual prejudice, present or potential, if the decision whether to bifurcate is delayed until the record is more fully developed. Indeed its arguments in support of bifurcation are not addressed to the considerations set out in Rule 42(b) at all, but appear to be directed to the idea that bifurcation should be used as a means of punishing OSC for what Agripac contends is an attempt to extend the administrative investigation. Its argument that the case should be bifurcated is at bottom simply an objection to the case proceeding as a pattern and practice action at all.

The party seeking bifurcation has the burden of showing that it will be prejudiced if bifurcation is denied. The type of prejudice contemplated by Rule 42(b) is of a more specific character than the amorphous generalized prejudice which Agripac invokes. Typically it involves insulating a jury from evidence as to the extent of a plaintiff's injuries until liability is established, in order to avoid the possibility of the latter determination being unduly influenced by emotion or sympathy elicited by the severity or shocking nature of a plaintiff's injuries. Ayers v. Wal-Mart Stores, Inc., 941 F. Supp. 1163, 1165 (M.D. Fla. 1996). Jury confusion is another type of prejudice to be considered, United States v. 1,701.08 Acres of Land, 564 F.2d 1350, 1353 (9th Cir. 1977), as is the related concern regarding the complexity of the particular issues raised, Arnold v. United Artists Theatre Circuit, Inc., 158 F.R.D. 439, 459 (N.D. Cal. 1994). In illustrating the type of

potential prejudice which clearly justifies bifurcation of proceedings, the court in Ayers gave the following example:

> For example, in Miller v. N.J. Transit Authority Rail Operations, 160 F.R.D. 37 (D.N.J. 1995), the court ordered bifurcation where all that was left of plaintiff's body was his head, torso, and one limb when he electrocuted himself after a drinking party with his fraternity brothers on the defendant's electric train. Id. As such, the court found the issue of defendant's liability to be weak and that the plaintiff's grossly disfigured body could prejudice the jury's ability to assess the liability issue fairly.

941 F. Supp. at 1185. Agripac has not suggested that these concerns are present here, or that as the trier of fact I am likely to be confused by the issues or unduly impassioned by the extent of the injuries in this case. Neither is this a case like Triad Sys. Corp. v. Southeastern Express Co., 64 F.3d 1330, 1338 (9th Cir. 1995), cert. denied, 516 U.S. 1145 (1996), where there were specific, discrete issues involving two separate, complex bodies of copyright infringement and antitrust law to be applied to the same set of facts, a circumstance likely to engender confusion. No special circumstances have been advanced here to support an order bifurcating this case, and a piecemeal approach appears more likely to complicate proceedings and cause needless delay than to contribute to expedition or economy.

Whether or not the motion to bifurcate is granted is, of course, an entirely separate question from whether advertising or any other discovery should be stayed. Even were the motion to bifurcate to be granted, that would not necessarily be a reason to delay the development of the record. As noted by the court in Krueger v. New York Tel. Co., 163 F.R.D. 446, 449 (S.D.N.Y. 1995):

> The possibility that some portion of this case may be bifurcated for trial, or the fact that there may be more than one trial, does not adequately support plaintiffs' request to stay discovery. To the contrary, staying discovery at this point, given the circumstances of this case would be both inefficient and unfair.

A stay of the proposed advertising here would impede, not further, the development of the record. Agripac's professed concerns with developing a clear profile of the "victim" and a defined time frame for the relief sought will be best served by completing the gathering of evidence, not by delaying it. For the reasons stated in rejecting the request for a protective order, the motion to stay advertising will be denied.

IV. ORDER

Agripac's motion for a protective order is denied. The motion to bifurcate proceedings is denied without prejudice. The motion to stay advertising is denied. Distribution of OSC's notice will

be limited to the period of one month and the geographical area in and around Woodburn, Oregon.

SO ORDERED.

Dated and entered this 1st day of September, 1998.

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Ellen K. Thomas
Administrative Law Judge